

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
Criminal No. 08-364(1) (RHK)

|                           |   |                           |
|---------------------------|---|---------------------------|
| UNITED STATES OF AMERICA, | ) |                           |
|                           | ) |                           |
| Plaintiff,                | ) | GOVERNMENT RESPONSE IN    |
|                           | ) | OPPOSITION TO DEFENDANT'S |
| v.                        | ) | SECOND APPEAL FROM THE    |
|                           | ) | ORDER OF DETENTION        |
| THOMAS JOSEPH PETERS,     | ) |                           |
|                           | ) |                           |
| Defendant.                | ) |                           |

The United States of America opposes defendant Thomas Joseph Petters' second appeal from the order of detention.

Defendant's second appeal is both legally unfounded and factually inaccurate in material respects. It should be rejected.

To the extent the Court considers new information, which it need not do, the evidence will militate in favor of detention: As set forth below, the court-appointed Receiver recently notified the United States Attorney's Office that defendant Petters has been actively concealing assets and directing disbursements to third parties in violation of a court order.

PROCEDURAL HISTORY

The defendant's motion offers an opportunity to provide this Court with the extensive procedural history of this matter.

The Complaint and Detention Hearing

On October 2, 2008, the defendant, Thomas Joseph Petters, was charged by complaint with conspiracy, mail fraud, wire fraud, money laundering, and obstruction of justice. The charges related to the

defendant's execution of perhaps the largest fraud scheme ever perpetrated in Minnesota, and one of the largest in this country's history.

The defendant was arrested on October 3, 2008, and appeared before Magistrate Judge Franklin L. Noel for an initial appearance. Judge Noel ordered the defendant detained pending a preliminary hearing and detention hearing.

On October 7, 2008, a three-hour, preliminary and detention hearing was held before United States Magistrate Judge Jeffrey J. Keyes. The defendant agreed to submit the issue of probable cause on the affidavit. The government moved for the defendant's detention citing flight risk and risk to the community.

The United States presented exhibits and the testimony of Special Agent Brian Kinney of the Federal Bureau of Investigation. These exhibits included excerpts from surreptitious recordings of the defendant; the defendant's financial statement as of December 31, 2007; schedules of phone calls made from two co-defendants' phones (Robert White and Larry Reynolds); and a recording and transcript of a call between the defendant and co-conspirator Robert Dean White (the "White Recording"). The defendant offered the testimony of his daughter and brother.

Judge Keyes also had before him a report prepared by United States Pretrial Services recommending detention.<sup>1</sup>

During the White Recording, which occurred on October 1, 2008, the defendant made numerous detailed statements describing plans to flee the jurisdiction of the United States. The defendant encouraged White to do the same. The defendant also described another instance in which he fled and hid to avoid Colorado state criminal charges until a negotiated settlement of the pending charges was arranged.

Magistrate Judge Keyes took the matter under advisement. The next day, October 8, 2008, he returned to open court where he ordered the defendant detained. To support the order, he made the following detailed findings announced from the bench:

1. The taped recorded conversation between Mr. Petters and Mr. White on the evening of October 1 constitutes strong evidence of flight risk. Transcript of Detention Hearings dated Oct. 7-8, 2008 ("Det. Tr.") Det. Tr. II at 114.

2. "So the evidence shows that Mr. Petters discussed fleeing on October 1st . . . with his partner. The model he uses for fleeing is Mar[c] Rich. . . . It is clear that Mr. Petters has his

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<sup>1</sup>Copies of the documentary exhibits introduced at the detention hearing and the subsequent appeal on October 31, 2008 are attached hereto as Exhibit A. A courtesy copy of the transcripts and the audio recording will be provided to the Court under a separate cover letter.

own ideas about pulling off a similar plan for himself." Det. Tr. II at 116.

3. The recording "is more than a desperate defendant talking about just fleeing. The Defense here would minimize this as the grandiose speculation of a manic personality. However, we have here a person in Mr. Petters who has had control of billions of dollars, who has pulled off hugely complex business deals, who is accustomed to making grandiose schemes work. He has calculated how it would be a better deal to take his chances fleeing and then gaining leverage to strike, like Mar[c] Rich, a great deal. Given Mr. Petters' track record of extraordinary international business success, often against very great odds, his statements must be taken seriously." Det. Tr. II at 116 - 117.

4. "[T]he phone conversation of October 1 [i]s serious and important evidence of flight risk. Mr. Petters admitted to having false identification, to having researched how to flee, to having discussed on October 1 a plan with his partner to flee, gather his family and use the Mar[c] Rich model to get a better deal." Det. Tr. II at 117 - 118.

5. "The weight of the evidence supports a detention decision in several ways. It underscores the fact that Mr. Petters is facing a very substantial risk of a very, very long prison sentence; perhaps the rest of his life." Det. Tr. II at 119.

6. Mr. Petters' "unaudited preliminary and tentative statement of [his] financial condition . . . is Mr. Petters' own rendition of his assets and there's no way of verifying at this point its completeness." Det. Tr. II at 120.

7. "Mr. Petters was counseling White to flee and suggesting how he might accomplish this." Det. Tr. II at 120.

8. "Home detention would not stop a resourceful and determined Defendant from fleeing, and the record here demonstrates that Mr. Petters falls into that category." Det. Tr. II at 121.

#### The Receivership/Restraining Order

Days before, on October 3, 2008, a Temporary Restraining Order was issued in a parallel civil matter, United States v. Thomas Joseph Petters, et al., Civil No. 08-5348 (ADM/JSM). Among other things, the Order precluded Petters from transferring, disbursing or otherwise disposing of funds and assets owned or controlled by Petters. (A copy of the Temporary Restraining Order is attached hereto as Exhibit B.)

On October 14, 2008, the United States and Petters entered into a Stipulated Order for Preliminary Injunction, Appointment of a Receiver and Other Equitable Relief. Among other things, the Order froze Petters' assets and precluded him from transferring, disbursing or otherwise disposing of funds and assets. The Order also required Petters to disclose all assets to the Receiver. (A

copy of the Stipulated Preliminary Injunction is attached hereto as Exhibit C.)

Since then, through his attorneys, Petters purported to identify his assets to the Receiver. According to a recent report from the Receiver, the defendant concealed \$50,000 that had been transferred from a Petters' business account to the personal account of the defendant's brother-in-law. As part of the receivership the defendant requested that the Receiver make certain disbursements to his girlfriend. The Receiver, and thereafter Judge Ann Montgomery, denied these requests. To circumvent these decisions, Petters personally directed disbursements of thousands of dollars - as recently as January 13, 2009 - to his girlfriend from the concealed assets. (A copy of the Receiver's Special Report is attached hereto as Exhibit J.)

#### The October Co-Conspirator Guilty Pleas

On October 8, 2008, three of the defendant's conspirators, Robert Dean White, Deanna Lynn Coleman, and Michael Catain, entered guilty pleas before the Honorable Paul A. Magnuson to charges related to their participation in the defendant's scheme.

Coleman and White, both long-time Petters associates and Petters Company, Inc. officers, pleaded guilty to assisting Petters execute the massive fraud scheme. (Copies of their respective plea agreements are attached hereto as Exhibits D & E.)

Catain, also a long-time Petters associate, pleaded guilty to conspiring with Petters to launder over \$6 billion as part of the scheme through a Catain business account over the course of just 6 years. (A copy of his plea agreement is attached hereto as Exhibit F.)

Two weeks later, on October 23, 2008, a fourth defendant, Larry Reynolds also pleaded guilty. Reynolds, a long-time Petters associate from California, also pleaded guilty to conspiring with Petters to launder over \$6 billion as part of the scheme through his own business account. (A copy of his plea agreement is attached hereto as Exhibit G.)

#### The Detention Appeal

On October 20, 2008, defendant Petters filed his first appeal of Magistrate Judge Keyes' detention order. On October 31, 2008, a four-hour hearing was held before Chief Judge Michael A. Davis, during which he heard from government and defense witnesses.<sup>2</sup>

Like Magistrate Judge Keyes, Chief Judge Davis listened to the White Recording and reviewed the transcript.<sup>3</sup>

The defendant called his girlfriend, Tracy Mixon, to testify on his behalf. Among other things, Mixon testified Petters' life was "out of control" and he was depressed. Transcript of the

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<sup>2</sup>A courtesy copy of the transcript will be provided to the Court under a separate cover letter.

<sup>3</sup>The White Recording transcript (Gov't Ex. 6) is included in Exhibit A.

Hearing dated Oct. 31, 2008 ("Appeal Tr.") at 57-60. She also acknowledged that Petters loves to gamble. Id. at 78-79.

The defendant also called one of his prior attorneys, Steve Meshbesh, regarding a number of matters including a larceny charge that Meshbesh described as a "financial dispute" arising from a Petters' business in Colorado. Appeal Tr. at 84-85. Following an inquiry from a potential investor in 2002 regarding the criminal history that was uncovered during due diligence, Meshbesh was hired by Petters to expunge the record. Appeal Tr. at 91-93.

At the end of the hearing, Chief Judge Davis ordered Petters to remain in custody.

#### The Indictment

On December 1, 2008, a United States Grand Jury returned a twenty-count indictment against Petters and two of his wholly-owned companies. (A copy of the indictment is attached hereto as Exhibit H.)

The indictment alleges that Petters executed a multi-billion dollar fraud scheme utilizing his companies, Petters Company, Inc. ("PCI") and Petters Group Worldwide LLC.

#### The Wemhoff Plea

On December 19, 2008, James Wemhoff, Petters' long-time accountant and Executive Vice President - Finance, Tax, and Treasury, pleaded guilty to conspiring with Petters to avoid paying



taxes and filing false tax returns. Specifically, Wemhoff, a 67-year old C.P.A. acknowledged assisting Petters evade taxes on proceeds Petters obtained from PCI (which were fraudulently obtained as part of the scheme), failing to file tax returns for PCI, and creating false financial statements for PCI, which were then used to induce investors to give Petters money. (A copy of his plea agreement is attached hereto as Exhibit I.)

#### ARGUMENT

Under 18 U.S.C. § 3142(f), the issue of detention may be reopened if "the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue."<sup>4</sup>

Defendant's motion fails on its face and offers no new information or argument. Indeed, defendant's argument - "it is not possible to accomplish this task [of preparing for trial] while Mr. Petters remains in custody" - is exactly the same argument that has been made previously by defense counsel Hopeman. Although the argument was ably made, it was ultimately rejected by both Judges.

Indeed, the only new aspect of this second appeal is the addition of a new attorney, Paul Engh. There is no question but

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<sup>4</sup>The language of the 3142(f) - "the judicial officer" - suggests that a motion to reopen detention should be returned to the same judicial officer who made the original detention determination, rather than simply seeking a new determination of the same issue by a different judge. In any event, the government has no objection to the motion being presented before this Court.

that Mr. Petters has surrounded himself with a capable array of advocates to represent him. Nevertheless, the instant motion includes serious omissions and misstatements in the defendant's description of facts as set forth in his memorandum.

1. Defense Attorney/Client Access. Defendant incorrectly contends that the government has failed to consider alternative facilities. Importantly, the defendant fails to advise the Court that immediately following the hearing before Chief Judge Davis, prosecutors inquired with defense counsel regarding his interest in moving the defendant to Hennepin County Jail. Prosecutors were told in no uncertain terms that such a move would not be of assistance to defense counsel. Defense counsel have never suggested otherwise. Moreover, the United States Attorney's Office did inquire with the Marshal's Service regarding the possibility of such a move. The United States Attorney's Office was advised that the Marshal's Service does not have a contract with Hennepin County Jail.

Instead, given the nature of the case, the Marshal's Service and the Sherburne County Jail Administrator made the following accommodations:

- client access seven days per week from 8 a.m. until 10 p.m. (with the exception of certain periods such as lunchtime, dinnertime, the 1:30 p.m. - 2:30 p.m. headcount, and lockdowns or emergencies);

- a dedicated conference room with laptop capacity; and
- permission to leave a reasonable quantity of documents with the defendant each night.

Defendant fails to acknowledge these accommodations, which include 14-hour-a-day, seven-day-a-week access in a dedicated conference room. Instead, the defendant simply asserts that he should be treated differently than other in-custody defendants.

Defendant's "invitation" to the Court "to carry the 160 boxes of materials that must be reviewed" also omits material facts. The government has already undertaken the task of scanning the documents obtained from the Petters headquarters. Indeed, most of the document production has been, and will be, by disk. Thus, defense counsel will have disks containing images of the documents, which may be reviewed on a laptop computer without any need to cart 160 boxes.

2. Discovery. Defendant's assertion that the government is tardy with its discovery obligations is also inaccurate. The government has met its Rule 16 obligations. Indeed, the government began providing defense counsel with substantial discovery in October 2008, months before indictment.

Notably, to date, the government provided the defendant with hours of consensual recordings. Similarly, the government provided the defendant with the memorandum reflecting the defendant's

admission of guilt when first confronted by law enforcement on September 24, 2008.

The government has also provided the defendant with copies of the search warrants it executed in the investigation.

With respect to documents obtained by these search warrants, the government has not determined which documents, it will utilize as exhibits at trial. Although not required under Rule 16 to produce the documents, the government has made documents available to defense counsel. After consultation with defense counsel in November and December 2008, the government voluntarily undertook to have the documents taken from the Petters headquarters scanned so that defense counsel could be provided with a copy. That effort, which began in December, will likely be completed in February. (The last boxes will be shipped for scanning only after defense counsel have completed their preliminary review.)

3. Concealed Assets/Violation of the Court Receivership Order.

The defendant argues that the government has no evidence that he has secreted assets, which might be used for flight. Not so. The Receiver recently notified the United States Attorney's Office it had found evidence of secreted assets and the defendant's repeated violation of Judge Montgomery's Order.

As noted above, on October 3, 2008, the defendant's assets were frozen and, thereafter, a receiver was appointed to preserve and to maintain the defendant's assets. Under the terms of the

receivership, defendant Thomas Petters was court-ordered to identify all of his assets. Through his attorneys, Petters purported to identify his assets.

Recently, the Receiver reported that Petters, with the assistance of family members, secreted \$50,000 by transferring the funds on October 2, 2008 from a corporate bank account of a Petters subsidiary to the personal bank account of a Petters' brother-in-law. In violation of the Court's Order, the defendant did not disclose the funds to the Receiver. See Exhibit J.

During the Receivership, defendant Petters requested certain disbursements to his girlfriend from receivership assets. Those requests were denied by the Receiver and Judge Montgomery. Thereafter, Petters has personally directed the distribution of the corporate funds to his girlfriend and others, violating the court order. This report was then confirmed by a federal agent. The Receiver reports that the defendant has dissipated over \$25,000, including a recent disbursement of \$3,500 on January 13, 2009. Id.

4. Defendant Assets/Family Assets. The defendant's offer to pledge his assets is meaningless. His purported wealth is the product of a multi-billion dollar fraud. The defendant's assets have been overtaken by bankruptcy and civil lawsuits; he will remain penniless for the rest of his life, subject to substantial personal money judgments.

The defendant's offer that "certain," unspecified members of his family are also willing to pledge personal assets is also suspect. Any assets would be subject to a hearing to prove they were not obtained through fraud. Through its investigation, the government has determined that the defendant was generous with the money he stole, spreading his fraudulent largesse to family, friends and colleagues. The government intends to undo the defendant's fraud. Where the government finds that proceeds of the fraud were transferred to third parties, it intends to recover those assets for the victims of the defendant's fraud.

5. Weight of the Evidence. Finally, defendant contends that the weight of the government's case should not be considered. This is incorrect as a matter of law. 18 U.S.C. § 3142(g)(1) & (2).

With regard to the nature of the offense charged, defense counsel has compared the seriousness of the case to first degree murder.

With regard to the weight of the evidence, defendant's dismissal of the strength of the government's case is itself hollow. Indeed, it reflects his refusal to face reality.

The defendant cannot contend there was no fraud. The bankruptcy of Petters' companies irrefutably demonstrates billions of dollars in liabilities without assets. Guilty pleas from five long-time Petters colleagues and associates - in which many are

facing twenty-year terms of imprisonment - leave no doubt as to the occurrence of the fraud.

The defendant is left to claim he was an unwitting victim of a multi-billion dollar fraud taking place in his own company in which he was the principal beneficiary. While defense counsel wants this Court to believe the case will be tried with millions of pages of documents obtained in the investigation (and, undoubtedly documents will be introduced as exhibits), this is not a "documents" case. As the defendant is well aware, this case is based on his own words caught in hours of recordings, his confession to agents, the testimony of his co-conspirators (cooperating defendants and others), and the testimony of numerous investors who will testify Petters was directly representing that he was buying and selling electronics merchandise when there was no such merchandise.

CONCLUSION

The defendant's latest appeal offers no legal or factual basis upon which this Court should reverse the carefully considered decision of Magistrate Judge Keyes and Chief Judge Davis.

For the reasons set forth herein, the government requests that the Court deny defendant's second appeal from the detention order.

Date: January 23, 2009

FRANK J. MAGILL, JR.  
United States Attorney

BY: \_\_\_\_\_ s/ Joseph Dixon \_\_\_\_\_  
JOSEPH T. DIXON, III  
JOHN F. DOCHERTY  
JOHN R. MARTI  
TIMOTHY C. RANK  
Assistant U.S. Attorneys